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106TH CONGRESS
1ST SESSION

H. R. 952

To amend the Telecommunications Act of 1996 to preserve State and local authority over the construction, placement, or modification of personal wireless service facilities.

IN THE HOUSE OF REPRESENTATIVES

MARCH 3, 1999

Mr. BASS introduced the following bill; which was referred to the Committee on Commerce

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A BILL

To amend the Telecommunications Act of 1996 to preserve State and local authority over the construction, placement, or modification of personal wireless service facilities.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Local Zoning Preservation Act of 1999''.

SEC. 2. FINDINGS AND PURPOSE.

(a) FINDINGS.—Congress makes the following findings:

(1) In the Telecommunications Act of 1996, Congress preserved local zoning authority over decisions regarding the placement, construction and modification of personal wireless service facilities, except that (A) the zoning application must be acted upon within a reasonable amount of time; (B) the decision must be in writing and be supported by substantial evidence; (C) the decision must not be based on concerns about the environmental effects of radio frequency emissions from facilities; and (D) the State or locality must not discriminate among personal wireless service providers.

(2) State and municipal zoning decisions traditionally have been afforded virtually complete deference by Federal courts. Issues of land use are distinctly local and therefore fall on the State-side of the federalism divide.

(3) When Congress passed the Telecommunications Act of 1996, it anticipated the need for and proliferation of personal wireless service facilities. Congress, however, included the provisions on the preservation of local zoning authority because it also realized the need to protect State and local authority to regulate the placement, construction, and modification of these facilities, with few limitations.

(4) The limitations in the Act have forced States and localities into needless litigation regarding denials of facility applications. In some cases, the courts have misinterpreted the intent of the limitations in the Act on State and local authority, forcing many States and localities to approve applications for construction of unsightly mammoth personal wireless service towers in their community.

(5) Many residents of States and local towns have expressed concerns about the impact of personal wireless facilities and towers on property values, aesthetics, and the character of local communities.

(6) Many localities have refused to approve personal wireless service facility applications in response to citizen concerns about the facility and tower impacts on property values, aesthetics, and character of the community.

(7) A specific limitation included in the section 332(c)(7)(B)(iii) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, provides that any decision by a state or local government to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by ''substantial evidence''

contained in the written record. The conference report for the Telecommunications Act of 1996 defined ''substantial evidence contained in the written record'' as the traditional standard used for judicial review of agency actions—more than a scintilla of evidence but less than a preponderance.

(8) Denials of these personal wireless service facility applications have led to litigation in Federal courts, sometimes resulting in federal judges overturning local zoning board decisions.

(9) The Federal courts are split on what constitutes ''substantial evidence'' to uphold a local zoning board's decision to deny a permit for construction, placement, or modification of personal wireless service facility.

(10) Some Federal courts have refused to acknowledge citizen concerns about aesthetics or a decline in property value as legitimate reasons for denying a personal wireless service facility application, holding that such concerns do not constitute ''substantial evidence''. See, e.g., APT Minneapolis, Inc. v. City of Maplewood, 1998 WL 634224, at *5 (D. Minn. Aug. 12, 1998) (concluding that ''[c]ourts construing the TCA have universally held that general aesthetic considerations fail to meet the sub-

stantial evidence test''); Omnipoint Communications Enterprises, Inc. v. Town of Amherst, N.H., Civil No. 97–614–JD (D. N.H. Aug. 21, 1998) (stating that ''[a]lthough aesthetic considerations may be properly taken into account by local governments in some circumstances, they cannot be used to exclude PWS towers entirely'').

(11) Other Federal courts, however, have held that local residents' concerns about the personal wireless service facility's impact on aesthetics of the community constitute ''substantial evidence''. See, e.g., Cellular Telephone Co., v. Town of Oyster Bay, 1999 WL 35195, at *7 (2d Cir. Jan. 29, 1999) (concluding that ''aesthetics qualify as a permissible ground for denial of a permit only if we can conclude that there was 'more than a scintilla' of evidence . . . before the [Zoning] Board on the negative visual impact of the cell cites''); AT&T Wireless PCS, Inc. v. City Council of the City of Virginia Beach, 155 F.3d 423, 427–28 (4th Cir. 1998) (concluding that testimony from citizens ''demonstrating concerns about the aesthetics of the towers and their incompatibility with the residential character'' of the community ''is more than enough to demonstrate the

real, and surely reasonable, concerns animating the democratically elected'' city council's decision).

(12) To provide the courts better guidance the Telecommunications Act of 1996 must be amended to clarify that the substantial evidence test may be satisfied by testimony of local residents expressing concerns about the impact of personal wireless service facilities on aesthetics, property values, and the character of residential neighborhoods. Such a legislative change would not discriminate against personal wireless service providers or impede their attempts to provide personal wireless services, but instead would encourage providers and States and localities to work together to design towers, facilities, or other feasible alternatives that do not intrude or diminish the aesthetics of residential communities, thus avoiding costly and protracted litigation.

SEC. 3. AMENDMENTS.

(a) SUBSTANTIAL EVIDENCE.—Section 332(c)(7)(B)(iii) of the Communications Act of 1934 (47 U.S.C. 332(c)(7)(B)(iii)) is amended by adding at the end the following: ''For purposes of this clause, the term 'substantial evidence' includes testimony by local residents expressing their concerns about the impact of personal wire-

less service facilities on the aesthetics, property values, and the character of the community.''.

(b) BURDEN OF PROOF.—Section 332(c)(7)(B)(v) of such Act is amended by inserting after the second sentence the following: ''In any such action in which a person seeking to place, construct, or modify a tower facility is a party, such person shall bear the burden of proof.''.

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